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Supreme Court, U.S.
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No. 08-1366

In the
SUPREME COURT of the UNITED STATES

JOHN P.W. ROSCH
Petitioner,

v.

WHATCOM COUNTY, WASHINGTON,
Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals of the State of Washington

SUPPLEMENTAL BRIEF FOR THE PETITIONER

WILLIAM JOHNSTON
Counsel of Record
401 Central Avenue
Bellingham, WA 98225
(360) 676-1931

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of this Court, Petitioner John P.W. Rosch files this supplemental brief to address the Court's recent ruling in *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____ WL 1576573 (2009) which is relevant to the disposition of his petition for a writ of certiorari.

1. *Caperton v. A. T. Massey Coal Co.*, 556 U. S. ____ (2009) is the Court's most recent application of the Due Process Clause to prohibit economic incentives from influencing judicial decision making. Mr. Rosch's petition for a writ of certiorari should be granted here because, like in *Caperton*, his case presents a situation where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, slip op. at 1 (quoting *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

The Court again recognized in *Caperton* that "a fair trial in a fair tribunal is a basic requirement of due process." *Caperton*, slip op. at 6 (quoting *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed 942 (1955). Rosch, like *Caperton*, found himself before a decisionmaker who had a financial interest that would tempt him to disregard neutrality. The Washington forfeiture statute lets the sheriff's department keep the vehicles he declares forfeit, or retain 90% of their value if they are sold. This ensures that in *every* case that comes before the sheriff, there is a great temptation "not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927),

quoted in *Caperton,* slip op. at 16.

2. Granting certiorari in this case would not implicate the concerns of Chief Justice Roberts and Justice Scalia described in their dissents in *Caperton*. Rosch does not present a claim of unconstitutional bias reflected in particular facts alleged to be extreme. Rather, the unconstitutional bias in this case exists on a systematic level. The Washington statute challenged by petitioner Rosch ensures that every decision the sheriff makes to forfeit property offends the due process protection against a financially interested adjudicator.

Moreover, the safeguard relied upon by Chief Justice Roberts in his dissent in *Caperton* is not present. "All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise." *Caperton,* slip op. at 2 (ROBERTS, C. J., dissenting). The sheriffs who adjudicate forfeitures in Washington have not taken such an oath; they are not governed by the state code of judicial conduct; and they do not possess the education, experience or expertise to act as judges, but the Washington legislature has given them judicial power anyway.

RCW 69.50.505 gives the sheriff, as the chief law enforcement officer of the seizing agency, the authority to adjudicate the forfeiture of personal property. His department benefits financially from a decision to forfeit. If he dismisses the forfeiture proceeding for lack of merit, his department receives nothing. If he declares the item forfeit, the sheriff may either retain the forfeited property for

official use or else sell it and retain 90% of the net proceeds. RCW 69.50.505(7), Pet. Appendix E, 18-A.

This substantial incentive places a thumb on the scales on the side of forfeiture in *every* case. Such a significant temptation renders the sheriff unfit to act as judge under the Due Process Clause as well as under *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

3. *Caperton* demonstrates that the due process concern with conflicts resulting from financial incentives is not limited to "the traditional common-law prohibition on direct pecuniary interest." *Caperton*, slip op. at 7-8. The adjudicator need not have his personal income augmented in order for the principle to apply; rather, the question whether due process is offended turns on the possible temptation the adjudicator may face. *Caperton*, slip op. at 8-9, citing *Ward v. Monroeville*, 409 U.S. 57,60 (1972).

The sheriff's court of Whatcom County has jurisdiction over the forfeiture of a wide range of property and currency. The underlying record in this case demonstrates that in Whatcom County the amount derived from forfeitures was $330.961.06 in 2005; $99,730.20 in 2004; and $859.124.45 in 2003. These are not trifling sums and the sheriff's interest in them is not remote. Petitioner Rosch's 2001 Chevrolet pickup truck had a value of approximately $15,000. Had the sheriff's ruling not been overturned in superior court, the forfeiture would have resulted in substantial loss to Rosch and substantial gain to the sheriff's office. As the underlying record demonstrates, the sheriff has

ordered forfeiture of items of personal property having even greater value. For example, one item forfeited in 2005 had a value of $17,750.00. In 2004 one item had a value of $34,750.00. In 2003 the sheriff's office reported one forfeiture of just $12.00 and another single forfeiture of $14,300.00. It is unlikely that the village mayors in *Tumey* and *Monroeville* ever imposed such a fine in any single case. There as here, the problem was the existence of a system that gave the decision maker a motive to make decisions that would help with the financial needs of the municipality. That the sheriff can obtain such large sums for his department by virtue of a single forfeiture decision only makes the problem worse. Like *Tumey*, *Monroeville*, and most recently *Caperton*, this case calls out for enforcement of the Due Process Clause.

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice clear and true between the State and the accused denies the latter due process of law.

Tumey, 273 U.S. at 532.

CONCLUSION

Following *Caperton* and the line of cases cited therein, this Court should grant Rosch's petition for certiorari and enforce the Due Process Clause. The State has created a tribunal for the adjudication of property rights that is systematically incapable of

applying the law impartially. It will continue unless this Court acts. The sheriff's court created by RCW 69.50.505 is a constitutionally defective system for adjudicating property rights and it cannot be salvaged through the offer of a judicial alternative. Rosch is entitled to a declaration that the statute is unconstitutional and to an award of attorney fees and costs under 42 U.S.C. §§ 1983 and 1988.

Respectfully submitted.

WILLIAM JOHNSTON
Counsel of Record
401 Central Avenue
Bellingham, WA 98225
(360) 676-1931